LIBRARY
SUPREME COURT, U. S.

FILED
APR 2 1969
JOHN F. DAVIS, CLERK

1258

In the Supreme Court of the United States

OCTOBER TERM, 1968

o——o——o

No. 19103—Criminal

o——o——o

EDWARD A. DOSEK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

o——o——o

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

o——o——o

CLAYTON H. SHROUT,
1004 City National Bank Building
Omaha, Nebraska
and
EDWIN F. DOSEK,
626 Anderson Building
Lincoln, Nebraska
Counsel for Petitioner

PRIESMAN GRAPHICS—OMAHA, NEBRASKA

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	7
Appendix "A"	8

CASES CITED

Escobedo v. Illinois, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758.	5
Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974.	4
U.S. v. Onassis, 132 F. Sup. 327.	5
United States v. Wainwright, 284 F. Supp. 129 (1968).	5

STATUTE CITED

15 U.S.C.A., paragraph 78 u (d).	4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 19103–Criminal

EDWARD A. DOSEK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on December 31, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, entered on December 31, 1968, is printed in Appendix "A" hereto, infra pp. ———— and is reported in ———— Fed. ————.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on December 31, 1968, affirming conviction. On February 4, 1969, the same Circuit Court denied the petition for rehearing. An extension of time to April 3, 1969, to file this petition was granted by this Court.

Jurisdiction herein is invoked under 28 U.S.C.A., Sec. 1254 (1), Rule 22 (2).

QUESTION PRESENTED

Whether petitioner's motion for a directed verdict at the conclusion of the Government's case in chief and again at the conclusion of all the evidence should have been granted for the following reasons:

1) Are the provisions of 15 U.S.C.A., paragraph 78 u. (d), providing that no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or to produce evidence, documentary or otherwise, self-executing?

2) Did this petitioner have the mental capacity to intelligently waive his right under Amendment V of the Constitution of the United States not to incriminate himself?

STATEMENT

Petitioner Edward A. Dosek was convicted on all nine counts of the indictment. Count One of the indictment generally alleges that during the period of October 1, 1965 until October 19, 1965, the Petitioner knowingly and willfuly offered and sold securities of Securities Investors, Inc., which

securities were fraudulently sold for the purpose of obtaining money and property by means of untrue statements of material facts or omissions to state material facts. The remaining eight counts allege that the Petitioner fraudulently used the mails to promote and sell said securities to certain named individuals.

The case was tried to a jury commencing on July 31, 1967, and extending through August 9, 1967. At the conclusion of the Government's case in chief and again at the conclusion of all of the evidence Petitioner moved for a directed verdict (dismissal of the indictment) for the reason that all of the evidence predicated upon the inquiry of the Securities and Exchange Commission held on August 4, September 8 and September 29, 1965, should have been excluded.

The motions were overruled and the matter submitted to the jury which returned a guilty verdict on all of the nine counts.

Between the Government's rest and commencement of the petitioner's case evidence was adduced from two psychiatrists that the petitioner had been treated for mental illness at a State Hospital shortly after the SEC inquiry. Each of the psychiatrists testified that it was possible that on August 4, 1965, the petitioner could not have understood the warning given him in connection with his constitutional rights and the same could be true on the later investigative dates of September 8 and September 29, 1965. The purpose of this testimony being to demonstrate that petitioner could not intelligently waive any constitutional rights guaranteed him pursuant to a purported advisement of said rights by an SEC agent.

REASONS FOR GRANTING THE WRIT

1) This Court's attention is respectfully directed to 15 U.S.C.A., paragraph 78 u (d) which provides as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements and other records and documents before the Commission or in obedience of the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission on the grounds that testimony or evidence documentary or otherwise, required of him may intend to incriminate him or subject him to a penalty or forfeiture: But no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination to testify or produce evidence documentary or otherwise * * * "

The physical evidence in the case, consisting of books and records of Securities Investors, Inc., were obtained by the Government through a subpoena issued by the Securities and Exchange Commission, containing the words "Fail not at your peril." This subpoena unequivocally compelled the Petitioner to produce the records required by the Commission. Submission of this evidence was not voluntary. Moreover, the statutory language heretofore quoted is mandatory. Such a statutory provision would be repugnant to the Fifth Amendment if it did not contain language permitting the one subpoenaed to invoke his privilege against self-incrimination.

Petitioner contends that the language in 78 u (d) with reference to claiming the self-incrimination privilege is self-executing. Apropos of this position are the guidelines set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974, in the following language:

> "Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement that he does make may be used as evidence against him and that he has a right to the presence of an attorney, either

> retained or appointed. The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly and intelligently."

Petitioner admits that *Miranda* was decided subsequent to the first investigation of the Securities and Exchange Commission of the Petitioner's books and records. However, *Miranda* affirms and is a further expansion of *Escobedo v. Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, decided by this Court in June, 1964. The inquiry by the Securities and Exchange Commission of Securities Investors, Inc.'s books and records was commenced on August 4, 1965.

The advice as to rights given by SEC agent Davenport to the petitioner on August 4, 1965 did not in any way state that he had a right to remain silent, or that he had a right to refuse to surrender those books and documents and papers which he brought pursuant to subpoena or that if he did surrender said books, documents and papers he had a right to immunity from prosecution. The advisement did not mention that the petitioner had a right to appointed counsel.

This Court stated in *U.S. v. Onassis,* 132 F. Sup. 327:

> "A subpoena constitutes an unlawful search and seizure when its compulsion is being exerted upon a person whom the records incriminate."

In a recent case in the Tenth Circuit Court of Appeals, *United States v. Wainwright,* 284 F. Supp. 129 (1968), the Government obtained a conviction against Wainwright for falsely and fraudulently filing joint income tax returns during certain years. During trial, Wainwright objected to the introduction of certain evidence obtained from his books because his constitutional rights had been violated. The Tenth Circuit sustained his position holding that in order to have a

valid waiver of constitutional rights by a person suspected of a crime, the "accused" must be properly advised of these rights. It further stated that Wainwright became an "accused" so as to entitle him to an advisement of his constitutional rights at the time his case was referred by an Internal Revenue Service auditor to the intelligence division of Internal Revenue Service. The Court held that Wainwright was not adequately advised of his constitutional rights to remain silent and to the assistance of Counsel by the special agent of Internal Revenue Service at the time of the first visit. The evidence obtained by the Government during the period between the first visit and interrogation at which time the taxpayer was informed of his rights was procured in violation of his right not to incriminate himself and was suppressed. So too, in the case at bar, once the subpoena was issued by the Securities and Exchange Commission the petitioner became an "accused" subject to criminal prosecution.

Petitioner respectfully submits to this Court that the *Miranda, Escobedo, Onassis,* and the *Wainwright* decisions must be taken together with that portion of 15 U.S.C.A., paragraph 78 u (d) of the Securities and Exchange Statute, providing that "no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed the privilege against self-incrimination to testify * * *." Taking the decision and the statutory language thus together, compels the conclusion that the statutory language is self-executing thus relieving the petitioner of the necessity of specifically claiming his privilege against self-incrimination at the time that he delivered, pursuant to subpoena duces tecum, the documentary evidence to the Securities and Exchange Commission. Petitioner contends that Congress must have intended this interpretation of the statute, especially in the absence of an advisement by the SEC at the time of obeyance to the subpoena, that the Petitioner was entitled to claim immunity from prosecution.

2) It is unnecessary to elaborate further at this time on whether or not the petitioner could intelligently waive his rights as spelled out in *Miranda* and *Escobedo* supra. Suffice it to say that the two experts testified that Dosek's judgment was impaired when they saw him in November of 1965. One of the two doctors, Kenneth O. Hubble, testified that at the time Dosek was definitely psychotic with poor prognosis, meaning that there probably would never be a complete recovery. In this connection, Petitioner's wife testified that he had first become mentally ill in 1955 and had undergone periodic treatment thereafter. Petitioner could not have intelligently waived his right not to incriminate himself during the SEC inquiry.

CONCLUSION

For the reasons heretofore set forth, Petitioner respectfully petitions this Court that a writ of certiorari be granted.

Respectfully submitted,

CLAYTON H. SHROUT,
1004 City National Bank Building
Omaha, Nebraska
and
EDWIN F. DOSEK
626 Anderson Building
Lincoln, Nebraska
Counsel for Petitioner

March 31, 1969

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19,103

Edward A. Dosek, Appellant,
v.
United States of America, Appellee.

Appeal From The United States District Court
For The District of Nebraska

[December 30, 1968]

Before Van Oosterhout, Chief Judge; Gibson and Bright, Circuit Judges.

Van Oosterhout, Chief Judge.

This is a timely appeal by defendant Edward A. Dosek from his conviction by a jury on each of nine counts of an indictment and the resulting sentence. Counts I to VI, inclusive, charged that defendant did by use of the mails in the offer and sale of securities to named individuals unlawfully, willfully and knowingly employ a scheme to defraud and obtain money and property, in violation of 15 U.S.C.A. §§77q(a) and 77x. Counts VII to IX charge separate uses of the mail in pursuance of a fraudulent scheme to sell securities in violation of 18 U.S.C.A. §1341. Defendant was given concurrent sentences of three years on Counts I, II, III, IV, V, VII and VIII. He was placed on probation on Counts VI and IX for a period of five years commencing with the expiration of the sentence on the remaining counts.

Defendant asserts he is entitled to a reversal based upon erroneous rulings of the trial court in the following respects:

I. Denial of his motion for acquittal made at the close of all the evidence because, (a) all evidence predicated upon the investigation of the Securities and Exchange Commission's inquiries of August 4, September 8, and September 29, 1965, should have been excluded; (b) Government claims of fraudulent misrepresentation were not proven.

II. Denial of Motion for change of venue.

III. Admission in evidence of Exhibits 73 and 74 and testimony relating thereto.

IV. Refusal to exclude Government's testimony predicated on bank records obtained without court order.

V. Denial of motion for new trial based on recantation of testimony of Government's witness Rerucha.

A careful examination of the record satisfies us that no prejudicial error was committed at defendant's trial and that the conviction should be affirmed. We shall discuss defendant's contentions in the order in which they are above stated.

I.

Defendant's contention that the court erred in denying his motion for acquittal is predicated upon defendant's insistence that the Government's case is largely based upon testimony given and papers produced by him at SEC investigation hearings held at Denver on August 4, September 8, and September 29, 1965, and that such information was obtained in violation of defendant's constitutional rights established in *Miranda v. Arizona*, 384 U.S. 436. In essence, Dosek claims: (1) that he

was involuntarily "in custody" when he was questioned by the SEC, and that consequently the failure of the SEC officers to apprise him of a "right to silence" *in haec verba* as set out in *Miranda v. Arizona*, supra, transformed an otherwise valid administrative inquiry into an illegal and unconstitutional interrogation; (2) that he had a right to be informed *in haec verba* that he could "refuse to surrender the documents and records" subpoenaed, and that the failure to so apprise him constituted a grant of immunity to him; (3) that he had a right to be advised that counsel would be appointed for him if he so desired; (4) that the warning given to him was unduly vague and indefinite and consequently ineffective; and in any event (5) he was incapable of intelligently and effectively waiving his constitutional rights because he was "psychotic", a "manic-depressive, manic type", and was undergoing psychiatric treatment for such mental ailments during the time period involved.

We find all of such contentions lack merit. The August 4, 1965, hearing was held some ten months before Miranda was decided by the Supreme Court. Defendant appeared pursuant to subpoena authorized by statute. The hearing was originally scheduled for Lincoln but at defendant's request the hearing was held at Denver. Defendant had ample advance notice of the hearing and appeared at the hearing without counsel. Before being asked any questions, defendant was advised that the investigation was being conducted by the SEC to ascertain whether the defendant had violated designated provisions of the securities and Exchange Act and defendant was told "this investigation could possibly reveal violations of other Federal statutes, as well as those that we have just alluded to. Under the Commission's practice it is our duty, as you are possibly aware, to advise you that you can be represented by an attorney of your choice, and that any evidence you give can be used against you at a later date. And you may refuse to give any testimony

or answer any questions, or give any evidence which may tend to incriminate or degrade you, or subject you to a fine, penalty or forfeiture." The defendant indicated that he was prepared to proceed.

The record shows that defendant had considerable business experience and that he had studied law rather extensively but had not been admitted to the bar.

Defendant was not in custody on any of the occasions when his testimony was taken before the SEC investigators. No coercion was practiced upon him. At the hearings subsequent to the August 4 hearing, defendant was represented by counsel and at such hearings additional books and records which had been requested by the SEC were produced without objection, and further interrogation took place.

In *Cohen v. United States,* 8 Cir., . . . F. 2d . . . , we held that the failure of the Internal Revenue Agents who were investigating the defendant's tax liability to give a Miranda warning did not render the information obtained inadmissible, and that no violation of the defendant's constitutional rights was established. We reviewed the pertinent authorities bearing upon the issue. The reasoning upon which the *Cohen* decision is based, in our view, fully applies to our present situation. Here, as in *Cohen,* there is nothing to indicate that the agents obtained the information by the use of coercion, fraud or misrepresentation. See *Muse v. United States,* 8 Cir., . . . F. 2d . . . ; *White v. United States,* 8 Cir., 395 F. 2d 170.

Defendant admits that he understood the warning given but claims his judgment was impaired by mental illness. There is evidence that the defendant had some mental illness a number of years before the events here material and again shortly after the interviews. The evidence, including the record of

defendant's testimony on the mental competency issue, is such as to leave room for the trial court's determination that the evidence given by the defendant at the hearings was voluntarily given.

Defendant devotes less than one page of his brief in support of his claim that the fraudulent misrepresentations were not proven. He sets forth no convincing facts nor law to support his contention. Under such circumstances, an extensive review of the voluminous evidence would appear to serve little purpose. Our examination of the record leaves no doubt in our mind that there is ample evidence of the fraudulent scheme to require the submission of such issue to the jury. It is quite true that defendant offered contradictory evidence and denied fraudulent intent. The jury, as it had a right to do, accepted the Government's evidence on the fraudulent scheme issue. In determining the sufficiency of the evidence to justify an inference of fraudulent intent and bad purpose, we must of course view the evidence in the light most favorable to the prevailing party, here the Government. *Elbel v. United States,* 10 Cir., 364 F. 2d 127; *Koolish v. United States,* 8 Cir., 340 F. 2d 513, 519; *Isaacs v. United States,* 8 Cir., 301 F. 2d 706, 726-27. When the evidence before us is so viewed, we have no doubt as to its sufficiency to support the guilty verdict.

II.

Defendant has fallen far short of establishing error in the denial of his motion for change of venue based upon prejudicial publicity. Seven newspaper publications are offered in support of the motion. Four of the publications were made in 1965. They contain a recitation of the allegations made by the SEC in a complaint for civil injunctive relief which preceded the indictment. Two articles published in separate papers in 1966 recite the return of the indictment upon which defendant was subsequently tried. The most recent article, published in the

Lincoln Journal on April 1, 1967, recites that defendant was arraigned on the indictment and that he entered a plea of not guilty to each count; that the trial would soon be held, and that a civil action previously commenced by the SEC resulted in enjoining the defendant from selling Securities Investors stock. The articles are largely factual reports of proceedings against the defendant and are barren of inflammatory matter. Defendant's trial commenced on July 31, 1967, approximately four months after the latest publication.

The disposition by a judge of a change of venue motion rests largely in the discretion of the trial court who is the one most familiar with the local situation, and a trial court's ruling upon such a motion will be upset only for a clear abuse of discretion. *Koolish v. United States,* 8 Cir., 340 F. 2d 513, 527; *Connelly v. United States,* 8 Cir., 249 F. 2d 576, 584-85; *United States v. Moran,* 2 Cir., 236 F. 2d 361, 362. The publicity here involved is in no way comparable to that in *Sheppard v. Maxwell,* 384 U.S. 333, relied upon by the defendant.

Defendant makes a vague claim that some jurors admitted reading the newspaper stories. The record does not show the voir dire examination. Defendant has not charged and certainly has not proven that any juror challenged for cause on valid grounds was not excused.

The defendant has failed to establish that the trial court abused its discretion in denying the motion for change of venue.

III.

Ralph DeWald, the Count IV victim of a fraudulent stock sale, after purchasing Securities Investors stock subsequently loaned defendant $8,000 evidenced by a note, Exhibit 74. The check disbursing the proceeds of the loan is Exhibit 73. Such

exhibits and testimony relating thereto were received in evidence over defendant's objection based on relevancy and materiality. After hearing from counsel extensively, the testimony was admitted. The record includes a letter from the defendant and DeWald's testimony that the loan was made for the purpose of aiding Securities Investors to purchase an insurance company, and that the loan proceeds were not used for that purpose. Acquisition of insurance companies was represented by the defendant to be one of the prime objectives of Securities Investors. The evidence relating to the loan has a bearing on the scope and extent of the fraudulent scheme. In *Hartzell v. United States*, 8 Cir., 72 F. 2d 569, 584, a mail fraud case, we held:

> "In prosecutions of this character, great latitude is allowed in the introduction in evidence of attending circumstances. *Smith v. United States* (C.C.A. 8) 267 F. 665. 'The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth.' *Williamson v. United States*, 207 U.S. 425, 28 S. Ct. 163, 172, 52 L. Ed. 278. False statements outside the scheme charged are competent to show the defendant's fraudulent intent. *Busch v. United States* (C.C.A. 8) 52 F. (2d) 79; *United States v. Sprinkle* (C.C.A. 2) 57 F. (2d) 968; *Vause v. United States* (C.C.A. 2) 53 F. 2d 346. The evidence admissible to establish the scheme and the intent may be extensive in scope and rests largely within the discretion of the trial judge. These admissions tended to show the nature of the scheme, the falsity of the representations, and the knowledge and intent of the defendant."

To like effect, see *Llanos v. United States*, 9 Cir., 206 F. 2d 852, 855; *Suetter v. United States*, 9 Cir., 140 F. 2d 103, 107.

In any event, the evidence in support of the fraudulent scheme is strong. Defendant's argument on prejudicial error is brief and weak.

Defendant has not established that any prejudicial error was committed in receiving Exhibits 73 and 74 and the testimony relating thereto.

IV.

There is no merit to defendant's contention that the bank records of Dosek Bonding and Insurance Company produced by the banks were illegally seized and hence, that the evidence obtained should be suppressed. The issuance of subpoenas is expressly authorized by 15 U.S.C.A. §78u(b). Such subpoenas were issued to the banks. The records supplied by the banks were records belonging to the banks, not to the defendant. Defendant has no standing to assert Fourth and Fifth Amendment rights with respect to the banks' records. *Galbraith v. United States,* 10 Cir., 387 F. 2d 617, 618; see *Elbel v. United States,* 10 Cir., 364 F. 2d 127; *Application of Cole,* 2 Cir., 342 F. 2d 5, 8.

V.

Lastly, defendant contends that the trial court abused its discretion in denying his motion for a new trial based upon the ground that the Government witness Rerucha recanted his testimony. Defendant had testified that he was ill during most of 1966 and was confined by reason thereof to his home or a hospital and that he was unable to carry on business activities. Rerucha on rebuttal testified that defendant sold him Securities Investors stock in July 1966. On surrebuttal defendant testified that Rerucha was mistaken and that he sold him stock in another company. The trial court held a full evidentiary hearing on the recantation issue. There is record evidence that defendant after his conviction went to Rerucha and cried and

pleaded with him to change his testimony to show that the stock he purchased was not Securities Investors. Rerucha signed an affidavit prepared by the defendant so stating. Rerucha's testimony is somewhat confusing and contradictory and tends to show that he initially believed the stock he had purchased was Securities Investors, but that the defendant had persuaded him that he might possibly be mistaken. Rerucha reaffirmed that the testimony given at the trial was true.

In *Johnson v. United States,* 8 Cir., 291 F. 2d 150, 154, we stated the applicable law as follows:

> "Courts look upon recantation with suspicion. The trial court, which has had the witness before it, is in a much better position to determine where the truth lies than an appellate court. An appellate court should not interfere with the trial court's findings which have evidentiary support. Motions for new trial based upon factual considerations should not be tried de novo upon appeal. *United States v. Johnson,* 327 U.S. 106, 111-113, 66 S. Ct. 464, 90 L. Ed. 562; *Connelly v. United States,* 8 Cir., 271 F. 2d 333; *United States v. Smith,* 7 Cir., 253 F. 2d 95, 98; *Newman v. United States,* 5 Cir., 238 F. 2d 861, 863; *Jencks v. United States,* 5 Cir., 226 F. 2d 553, 555."

In any event regardless of what stock was sold by defendant to Rerucha, his testimony contradicts defendant's testimony that he was unable to do any business in 1966 and it is very unlikely that the name of the stock which defendant unloaded on Rerucha would have any substantial effect upon the jury verdict.

We hold that defendant has failed to establish that the court committed error or abused its discretion in denying the motion for a new trial.

To summarize, we find that the court committed no error prejudicial to the defendant and that the defendant had a fair trial.

The judgment is affirmed.

A true copy.

Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.